(3)

No. 87-736

IN THE

Supreme Court of the United States

October Term, 1987

Honorable BERTRAM R. GELFAND,
Surrogate, Bronx County,

Petitioner,

v.

New York State Commission on Judicial Conduct,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner, BERTRAM R. GELFAND, submits this reply brief and prays that his petition for Certiorari be granted and respectfully suggests that summary reversal be considered by this Court.

POINT I

RESPONDENT'S BRIEF IN OPPOSITION MISSTATES THE "QUESTION PRESENTED".

Respondent seeks to obfuscate the issues presented by posing a "Question Presented" (Resp. 8)* that misconstrues the opinion of the New York Court of Appeals (Pet. App. 37 to 46).** It is disingenuous to contend that the most serious findings made by the Court of Appeals are in any way related to the charges in the Formal Complaint.

Except for the allegations in Charges I (b) and I (g),*** the balance of

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*References to "Resp." are to pages in respondent's brief in opposition.

**References to "Pet." are to pages of the petition. References to "Pet. App." are to pages of the appendix to the petition.

***As to Charge I (b), it is not disputed that this event occurred on Saturday and that petitioner sought to rectify it by the next day. As to Charge I (g), although it is alleged that what petitioner said to Judge Williams was

(Continued on next page)

the charges relate to allegations of misconduct in Petitioner's private life after August 3, 1985 and prior to December 5, 1985.

If the commission wished to level charges other than those in the Formal Written Complaint, it had the power to do so (N.Y. Judiciary Law, Section 44 (4) set forth at Resp. 5). Had it so proceeded petitioner would have had notice of these charges and had the opportunity to defend himself.

While the Court of Appeals condemns the commission for going beyond the charges, it quotes as fact the most inflammatory illustrations of this improper course. The Court states:

> "....the referee found that petitioner had misused his position
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> ---
>
> motivated by animus, no issue was ever raised as to the professional accuracy of his statements to Judge Williams.

throughout the entire course of the affair to prolong the relationship. The Commission determined that petitioner engaged in a course of misconduct throughout the duration of the relationship..." (Pet. App. 39)

There can be no better evidence of the irretreivably extreme extent to which the record reviewed by the Court of Appeals is tainted than this inflammatory reference to allegations that are beyond the charges in the Formal Complaint.

The allegations in the Formal Complaint are bland against the Court of Appeals' determination that petitioner acted "in order to prolong a sexual relationship with a law assistant" (Pet. App. 40). There is not a single allegation in the Formal Complaint that remotely constitutes an allegation that petitioner did anything improper "in order to prolong a sexual relationship".

The arguments in respondent's

brief (Resp. 12-13) that the phrase in the Formal Complaint "for personal reasons" that appears in Charges I (a) and I (b) (Pet. App. 2-3) constitute notice that petitioner was charged with "making adminstrative and personnel decisions, taking official actions, ***to prolong a sexual relationship" [emphasis added] (Pet. App. 40) are no less than disingenuous. Neither of these charges relate to any official "action". In the undisputed context of the matter, Charge I (a) clearly is an allegation of doing no more than saying something due to personal anger. Charge I (b) relates to delivering Ms. Gertel's personal possessions to her out of personal anger. The acts alleged in both charges could hardly be construed as conduct designed to "prolong a sexual relationship". Likewise, there is not a single allegation accusing petitioner of

seeking "to exact personal vengeance" (Pet. App. 40).

The ultimate misstatement of the charges of the Formal Complaint is the conclusion of the Court of Appeals that, "On August 3, 1985, petitioner fired the law assistant based on events in their personal relationship." As is more fully discussed on pages 9 and 10 of the petition, it is not disputed that petitioner was never accused of wrongfully firing his law assistant, nor did he fire her on August 3, 1985.

Respondent does not dispute the statement in the petition that the deftly worded Charge I (a), is not an accusation that petitioner fired Ms. Gertel on August 3. It is merely an allegation that he made a never acted upon statement on August 3 accelerating her departure date pursuant to her earlier July 21, 1985

resignation (Pet. 9-10). It is undisputed that this statement was withdrawn on August 4, 1985.

Ms. Gertel's resignation, and the circumstances surrounding it, were fully investigated. It is undisputed that her employment terminated on July 21, 1985. No charge appears in the complaint related to her actual termination.

The ultimate proof that the Court of Appeals denied petitioner his office for uncharged conduct, is the conclusion that he officially acted in order "to prolong a sexual relationship". (Emphasis added) Likewise, there is no possible way that the allegations in the Formal Complaint as to private conduct for "personal reasons" from August 3, 1985 forward can relate to a conclusion as to "Petitioner's repeated misuse of his judicial powers" (Pet. App. 42).

Nor can the Formal Complaint, whose allegations begin thirteen days after Ms. Gertel's termination be notice to petitioner that he was charged with "...allowing his personal relationships to influence both his judgement and the administration of the court over which he presides --- he could not help but impair public confidence in his integrity and impartiality" (Emphasis Added) (Pet. App. 43) The emphasized language is a pure speculation that is not only beyond the charges in the complaint, but inconsistent with the second sentence of the Court of Appeals' opinion (Pet. App. 37)

The "Questions Presented" are not as respondent argues, that the Court of Appeals failed to precisely repeat the language of the complaint (Resp. 12-13). The Court of Appeals either totally misapprehended the charges or went on to

create new charges of its own. Between an opening statement in the opinion that the events of August 3, 1985 to December 31, 1985* warranted removal (Pet App. 37) and a closing conclusion "that the acts described in the Formal Complaint constitute sufficient cause for removal" (Pet. App. 45), the Court of Appeals opinion is permeated with repeated "extensive findings of fact and legal conclusions based on uncharged incidents --- often of a sensational nature, ***" the very conduct for which it criticizes the commission (Pet. App. 44). The denial of due process that flows from findings of inflammatory uncharged conduct cannot be cured by intermingling alleged charged conduct and conclusory statements at the beginning and the end of a lengthy

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*No charges in the complaint involves a date beyond December 5, 1985.

opinion, when the opinion is permeated with findings of uncharged conduct.

The inflammatory uncharged conduct clearly had a profound influence on the conclusion as to "lack of candor". This is particularly clear when the bulk of the commission's finding on lack of candor relate to uncharged conduct. The degree of prejudice on the issue of candor is directly related to the findings of the uncharged conduct.

Clearly, in present day thinking a conclusion that a male employer has taken advantage of a female employee rightly places the employer in the posture of an ogre. Who would accept anything said by an ogre, no matter how true? It is the uncharged conduct that converts petitioner from a highly respected jurist (Pet 18-19, footnote), into a person not to be believed on any subject.

Respondent's brief misstates the content of Pet. 17-18 (Resp. 12-13, footnote 2).

POINT II

THE HEADNOTE OF THE OFFICIAL STATE REPORT OF THIS CASE REFUTES RESPONDENT'S CLAIM THAT THE FINDINGS BEYOND THE CHARGES ARE MERE COMMENT.

The headnote on the official report of the opinion of the New York Court of Appeals is prepared by the Official State Reporter, an appointee and functionary of the New York Court of Appeals.

The first and primary headnote on the Official Report of the Court of Appeals' opinion commences as follows:

"1. A determination of respondent State Commission on Judicial Conduct that petitioner be removed from the office of Surrogate, Bronx County, is accepted. Petitioner misused his position as Surrogate of Bronx County by making administrative and personnel decisions, taking official actions, and making implicit and explicit threats to court

officials and others in order to prolong a sexual relationship with a law assistant and later, to exact personal vengeance when she refused to continue their affair." (Matter of Gelfand, 70 NY2d 211)

The official report of the Court of Appeals determination is raised for the first time in respondent's brief (Resp. 10). It was not available when the petition was filed.

The contention in respondent's brief that the Court of Appeals' conclusion that petitioner acted "in order to prolong a sexual relationship with a law assistant" is a mere comment is belied by the headnote. Respondent asks this court to interpret the opinion of the Court of Appeals in a manner that is not only contrary to its clear language, but contrary to the interpretation of the Court of Appeals' own official reporter. The damaging nature of the finding relative to using one's position to obtain

sexual advantage is so serious that it cannot help but establish that the entire thinking of the Court of Appeals in embracing the sanction of removal was colored beyond redemption by injection into the case of uncharged serious sexual misconduct. At the very least, it is far from clear that without this uncharged conduct the sanction of removal would have been sustained. It is little wonder that other branches of government embrace with impunity unjustified attacks on the hard earned reputation of jurists in order to pander to the media, when judges of the highest court of a state themselves have no greater respect for the reputations of their fellow jurists.

POINT III

RESPONDENT'S BRIEF DOWNPLAYS THE GRAVITY OF THE INJUSTICE THAT JUSTIFIES THE GRANTING OF CERTIORARI.

Mr. Justice White in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 543, wrote for the majority:

"First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. (Citations Omitted) While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job."

In the instant case, petitioner, at the age of 57, has not only lost his judicial position.* His standing in the legal profession and the community has been so devastated by the uncharged conclusion that he used his position to

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*A position that he occupied with distinction for over 14 years and to which he had tenure of an additional 13 1/2 years.

prolong a sexual relationship so as to deny petitioner the opportunity for any meaningful employment remotely commensurate with his competence, experience and skill, either of a legal or adminstrative nature. The violation of petitioner's right to due process has literally destroyed his life.

POINT IV

RESPONDENT'S BRIEF MISTAKENLY SEEKS TO SUSTAIN THE COURT OF APPEAL'S UNCONSTITUTIONAL USE OF JUDICIARY LAW, SECTION 44 (9)

In this case the New York Court of Appeals' utilization of Judiciary Law, Section 44 (9) is unconstitutional. By making its own new findings of fact on issues not in the Formal Complaint, it finds petitioner guilty of charges of which he never had notice. This improper use of the statute in and of itself constitutes a denial of due process as is more fully discussed at pages 13-14 of the

petition.

POINT V

WHERE THE PETITION CLEARLY MANDATES REVERSAL AND A NEW HEARING, SUMMARY REVERSAL IS JUSTIFIED.

It is respectfully submitted that all that is necessary to establish petitioner's right to relief is a comparison of the Formal Complaint (Pet. App. 1-5) with the Opinion of the Court of Appeals (Pet. App. 37-46). Such a comparison establishes petitioner's right to relief under the authority of In re Ruffalo, 390 U.S. 544.

Judicial economy and consideration for the burdens of the individual litigant coping with the immense resources of the sovereign justifies the utilization of summary reversal. (Board of Education of Rogers, Arkansas v. Mc Cluskey, 458 U.S. 966;

Eckerd Drugs Inc. v. Brown, 457 U.S. 1128; Lane v. Smith, 457 U.S. 1102; Alabama v. Ritter, 454 U.S. 885; Harris v. Rivera, 454 U.S. 339; Jago v. Van Curen, 454 U.S. 14; Shipley v. California, 395 U.S. 818)

CONCLUSION

1. Petitioner has been deprived of the valuable property right of his office without due process.

2. In addition petitioner has been stripped of his reputation and professional standing by being removed from office based upon uncharged conduct of a sexual nature without due process.

3. That the injustice is of sufficient gravity to justify the granting of certiorari, particularly where certiorari is the sole avenue for any review of the only court involved in the matter.

4. That the issue is of

sufficient wide-spread importance so as to justify the granting certiorari. If the New York Court of Appeals can deny a tenured public servant of his position based upon uncharged acts, then the tenure of not only New York's approximately 3,300 judges, but the tenure of the state's hundreds of thousands of public employees is at the unfettered mercy of arbitrary extinction.

5. That respondent's brief presents no issue which would preclude this court embracing the course of summary reversal.

Respectfully submitted,

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